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No. 82-134

In the Supreme Court of the United States

OCTOBER TERM, 1982

TAXATION WITH REPRESENTATION OF WASHINGTON,
CROSS-APPELLANT

v.

DONALD T. REGAN, SECRETARY OF THE TREASURY, ET AL.

ON CROSS-APPEAL FROM THE
UNITED STATES COURT OF APPEALS FOR
THE DISTRICT OF COLUMBIA CIRCUIT

MOTION TO DISMISS

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TABLE OF CONTENTS

Page

Opinions below 1

Jurisdiction 2

Statute involved 2

Statement 2

Argument 3

Conclusion 7

TABLE OF AUTHORITIES

Cases:

"Americans United" Inc. v. *Walters*, 477 F. 2d 1169 rev'd on jurisdictional grounds *sub nom. Commissioner* v. *"Americans United" Inc.*, 416 U.S. 752 6

Beneficial Finance of Kansas, Inc. v. *United States*, No. 81-583 5

Better Business Bureau v. *United States*, 326 U.S. 279 7

Christian Echoes National Ministry, Inc. v. *United States*, 470 F. 2d 849, cert. denied, 414 U.S. 864 6

Cammarano v. *United States*, 358 U.S. 498 ..... 5, 6

Department of Banking v. *Pink*, 317 U.S. 264 5

Haswell v. *United States*, 500 F. 2d 1133, cert. denied, 419 U.S. 1107 6

Parker v. *Levy*, 417 U.S. 733 4

Page

Cases—Continued:

Slee v. *Commissioner*, 42 F. 2d 184 6

Taxation with Representation v. *United States*, 585 F. 2d 1219, cert. denied, 441 U.S. 905 6

United States v. *Harriss*, 347 U.S. 612 7

United States v. *Security National Bank*, No. 81-184 5

Constitution statutes, regulation and rule:

United States Constitution:

First Amendment 3, 5-6

Fifth Amendment 2

Internal Revenue Code of 1954 (26 U.S.C.):

Section 170(c)(2) 2, 3, 6
Section 501(c)(3) 2, 3, 6
Section 501(h) 6

28 U.S.C. 1252 ..... 2, 3, 4, 5

28 U.S.C. 1254(1) 4

28 U.S.C. 1291 ..... 3, 4

28 U.S.C. 2071 3

28 U.S.C. 2101(c) 5

28 U.S.C. 2103 5

Treasury Regulations on Income Tax (1954 Code) (26 C.F.R.), Section 1.501(c)(3)-1(c) 7

Sup. Ct. R.:

12.4 3

19.5 5

Page

Miscellaneous:

R. Stern & E. Gressman, *Supreme Court Practice* 79 (5th ed. 1978) 3

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MOTION TO DISMISS

The Solicitor General, on behalf of the United States, Donald T. Regan, Secretary of the Treasury, and Roscoe L. Eggar, Jr., Commissioner of Internal Revenue, moves pursuant to Rule 16.1 of the Rules of this Court that this cross-appeal be dismissed for lack of jurisdiction.

OPINIONS BELOW

The opinion of the district court (81-2338 J.S. App. 1a-9a) and its order granting judgment in favor of the government (*id.* at 10a) are unofficially reported at 43 A.F.T.R.2d 79-679. The opinion of the court of appeals en banc (81-2338 J.S. App. 11a-12a) is reported at 676 F. 2d 715.

JURISDICTION

The judgment of the court of appeals was entered on March 26, 1982. The government filed its notice of appeal on April 23, 1982. The appeal was docketed as No. 81-2338 on June 22, 1982, and the jurisdictional statement was received by cross-appellant on June 23, 1982. This cross-appeal was filed on July 23, 1982. See Sup. Ct. R. 12.4. As explained below, there is no basis for jurisdiction of this cross-appeal.

STATUTE INVOLVED

28 U.S.C. 1252 provides:

> Any party may appeal to the Supreme Court from an interlocutory or final judgment, decree or order of any court of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam and the District Court of the Virgin Islands and any court of record of Puerto Rico, holding an Act of Congress unconstitutional in any civil action, suit, or proceeding to which the United States or any of its agencies, or any officer or employee thereof, as such officer or employee, is a party.
>
> A party who has received notice of appeal under this section shall take any subsequent appeal or cross appeal to the Supreme Court. All appeals or cross appeals taken to other courts prior to such notice shall be treated as taken directly to the Supreme Court.

STATEMENT

In a memorandum in response to our jurisdictional statement in No. 81-2338, appellee joins with the appellants, United States and federal officials, in urging this Court to note probable jurisdiction to review the holding of the court of appeals that the lobbying limitations of Sections 501(c)(3) and 170(c)(2) of the Internal Revenue Code (26 U.S.C.) violate appellee's Fifth Amendment right to equal protection.

Appellee, however, has docketed a cross-appeal (No. 82-134) seeking review of the court of appeals' separate holding that the lobbying limitations of Sections 501(c)(3) and 170(c)(2) do not violate its right to freedom of speech and to petition Congress under the First Amendment. Cross-appellant seeks a ruling from this Court striking the lobbying limitation from the statute and a declaratory judgment that it is therefore entitled to tax exemption under Section 501(c)(3).

ARGUMENT

1. There is no basis for jurisdiction in this Court of this cross-appeal. Cross-appellant invokes (J.S. 2) Rule 12.4 of the Rules of this Court, but that rule only establishes procedures for taking a cross-appeal. It could not, and explicitly does not purport to, provide a basis for jurisdiction. 28 U.S.C. 2071.

The only conceivable basis for appellate jurisdiction in this case is 28 U.S.C. 1252, which cross-appellant likewise invokes. Section 1252 allows a direct appeal to this Court from a decision holding an Act of Congress unconstitutional in any civil action to which the federal government is a party. The second paragraph of that section provides that when one party takes a direct appeal to the Supreme Court, as the United States did here, all other *appeals* in the case must be taken to the Supreme Court. This provision does not create any right of appeal; it merely avoids piecemeal litigation by specifying the court to which a party may take an appeal. See R. Stern & E. Gressman, *Supreme Court Practice* 79 (5th ed. 1978). Thus, a party must have a right to appeal before it can take that appeal to this Court. Because a party ordinarily has a right to appeal to the court of appeals from any adverse district court ruling embodied in a final decision (see 28 U.S.C. 1291), when a direct appeal is taken to this Court from a *district court* order holding a

federal statute unconstitutional, the appellee may file a cross-appeal to this Court on another issue in the case.

Here, however, the United States appealed from a judgment of a *court of appeals* holding a federal statute unconstitutional. See *Parker* v. *Levy*, 417 U.S. 733, 742-743 n.10 (1974). Cross-appellant had no right to appeal to this Court from an adverse ruling of the court of appeals; it could seek review only by writ of certiorari. The fact that the United States has taken an appeal under 28 U.S.C. 1252 from a judgment holding a federal statute unconstitutional does not create a right of appeal on other issues where none existed before.[1] Accordingly, there is no jurisdictional basis for the instant cross-appeal.

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[1]In enacting the second paragraph of 28 U.S.C. 1252, Congress obviously was concerned with the situation where one party appeals as of right to this Court from a district court order holding a federal statute unconstitutional, and the other party also wishes to challenge rulings of the district court on appeal. If the latter issues were to be appealed to the court of appeals pursuant to 28 U.S.C. 1291, then a single case would proceed simultaneously in two separate courts. If, on the other hand, the latter issues could not be appealed at all, then a party would have been deprived of its right to appeal. The solution was to allow the party not challenging the holding of unconstitutionality to pursue its appeal in the Supreme Court as well.

This dilemma does not arise when one party takes an appeal to this Court from the judgment of the court of appeals. The other party already has received an appellate ruling on the issues decided adversely to it, and in the usual situation it would have had no right to appeal that ruling to this Court. Appellate review would have been available only by writ of certiorari under 28 U.S.C. 1254(1). Congress could not have intended to transfer this class of cases from the Court's discretionary docket to its mandatory docket simply because the opposing party was authorized to take an appeal.

Further evidence that the second paragraph of 28 U.S.C. 1252 was not intended to benefit parties such as cross-appellant is supplied by the second sentence of that paragraph, which provides that "[a]ll appeals or cross appeals taken to other courts prior to such notice [of appeal to the Supreme Court] shall be treated as taken directly to the Supreme

Treating the cross-appeal as a petition for certiorari (see 28 U.S.C. 2103), the petition must be denied. The judgment of the court of appeals was entered on March 26, 1982. The jurisdictional statement was filed 119 days later, on July 23, 1982. Thus, it fails to comply with the time limitations of 28 U.S.C. 2101(c), which are jurisdictional. *Department of Banking* v. *Pink*, 317 U.S. 264 (1942). Rule 19.5 of the Rules of this Court does provide that a respondent may file a cross-petition for certiorari within 30 days of receipt of the petition, but the Rules make no provision for the filing of a cross-petition in response to the docketing of an appeal.[2]

2. Even assuming that the Court has jurisdiction to grant certiorari here, the petition should be denied. The question presented by cross-appellant does not warrant review in this case.

As both courts below correctly recognized (81-2338 J.S. App. 5a-8a, 30a-31a), appellee's First Amendment claim is answered fully by this Court's decision in *Cammarano* v. *United States*, 358 U.S. 498, 512-513 (1959), which unanimously rejected the contention that denial of income tax deductions for lobbying expenditures presents a substantial constitutional issue under the First Amendment

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Court." This language clearly shows that Congress focused only on direct appeals to the Supreme Court from a district court. (Indeed, it was not until 1974 that this Court construed Section 1252 to allow appeal from a court of appeals). Hence, it is most reasonable to interpret the word "appeal" in the second paragraph of Section 1252 to include only appeals as of right.

[2]We have advanced the same argument with respect to jurisdiction and timeliness as to certiorari in a Motion to Dismiss filed in *Beneficial Finance of Kansas, Inc.* v. *United States*, No. 81-583, a cross-appeal filed in connection with the government's appeal in *United States* v. *Security National Bank*, No. 81-184, oral argument scheduled on October 6, 1982. The Court has not acted on our motion to dismiss that cross-appeal.

(see 81-2338 J.S. 10-16). On the authority of *Cammarano*, the courts of appeals and the Court of Claims have ruled uniformly that the lobbying limitations of Sections 501(c)(3) and 170(c)(2) impair no right protected by the First Amendment. *Taxation With Representation* v. *United States*, 585 F. 2d 1219, 1223-1224 (4th Cir. 1978), cert. denied, 441 U.S. 905 (1979); *Christian Echoes National Ministry, Inc.* v. *United States*, 470 F. 2d 849, 856-857 (10th Cir. 1972), cert. denied, 414 U.S. 864 (1973); *Haswell* v. *United States*, 500 F. 2d 1133, 1147-1149 (Ct. Cl. 1974), cert. denied, 419 U.S. 1107 (1975); see *"Americans United" Inc.* v. *Walters*, 477 F. 2d 1169, 1182 (D.C. Cir. 1973), rev'd on jurisdictional grounds *sub nom. Commissioner* v. *"Americans United" Inc.*, 416 U.S. 752 (1974). The holding below rejecting cross-appellant's First Amendment claim is fully in accord with that uniform authority.

Cross-appellant argues that *Cammarano* is distinguishable from this case because it upheld the denial of deductibility only for funds used specifically for lobbying whereas the lobbying limitations of Sections 501(c)(3) and 170(c)(2) disqualify appellee from holding charitable tax status and from receiving any tax-deductible contributions (82-134 J.S. 11). Contrary to cross-appellant's argument (*id.* at 13), these limitations are no broader than necessary to accomplish the underlying congressional purpose and are fully consistent with the First Amendment. Cf. 26 U.S.C. 501(h). As this Court pointed out in *Cammarano*, the lobbying limitations now embodied in Sections 501(c)(3) and 170(c)(2) "made explicit the conclusion * * * that 'political agitation as such is outside the statute, however innocent the aim * * *.' " 358 U.S. at 512, quoting *Slee* v. *Commissioner*, 42 F. 2d 184, 185 (2d Cir. 1930). The limitations on substantial lobbying correctly implement both that "sharply defined policy," *ibid.*, and the settled principle that the presence of a single nonexempt purpose, if substantial in nature, suffices

to disqualify an organization from holding charitable tax status. *Better Business Bureau* v. *United States*, 326 U.S. 279, 283, (1945); Treasury Regulations on Income Tax (1954 Code), Section 1.501(c)(3)-1(c) (26 C.F.R.). Cf. *United States* v. *Harriss*, 347 U.S. 612, 621-626 (1954).

CONCLUSION

The cross-appeal should be dismissed for lack of jurisdiction. Treating the jurisdictional statement as a petition for certiorari, the petition should be denied.

Respectfully submitted.

REX E. LEE
Solicitor General

SEPTEMBER 1982

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